

APPEAL NO. 010711

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 20, 2001. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth and ninth quarters. The claimant appealed and the respondent (carrier) responded. The claimant attached copies of numerous documents to his appeal, some of which were made part of the CCH record and others that were not offered at the CCH. Those documents that were not made a part of the CCH record are not considered on appeal. Section 410.203(a)(1). Those documents that are attached to the appeal and that were not made a part of the CCH record have not been shown to meet the requirements for newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 93280, decided May 26, 1993.

DECISION

The hearing officer's decision is affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides, in part, that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The parties stipulated that the claimant sustained a compensable bilateral shoulder injury on _____; that he has a 26% IR; that he did not commute IIBs; that the qualifying period for the eighth quarter was from July 8 through October 6, 2000; and that the qualifying period for the ninth quarter was from October 7, 2000, through January 5, 2001. There is no appeal of the hearing officer's finding that the claimant's unemployment during the relevant qualifying periods was a direct result of the claimant's impairment from his compensable injury. The SIBs criterion in dispute is whether the claimant attempted

in good faith to obtain employment commensurate with his ability to work during the relevant qualifying periods. Section 408.142(a); Rule 130.102(b)(2).

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the eighth and ninth quarters. Dr. R, the claimant's treating doctor, reported that the claimant is not able to do any type of work because of continuing problems with the claimant's right shoulder. However, according to a functional capacity evaluation done in June 2000 and a report by Dr. B, who examined the claimant at the carrier's request in January 2001, the claimant is able to perform sedentary work. The hearing officer found that during the relevant qualifying periods the claimant had the ability to perform sedentary work. The claimant did not look for work during the qualifying period for the eighth quarter. On his Application for SIBs (TWCC-52) for the ninth quarter the claimant did not document that he looked for work during every week of the qualifying period. In addition, there was conflicting evidence presented regarding the claimant's job search efforts during the qualifying period for the ninth quarter. There was evidence that the claimant told at least one potential employer that he was unable to work when he filed a job application. The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with the claimant's ability to work during the relevant qualifying periods. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge